

**MISCONDUCT INVOLVING WEAPONS .....April 2018**

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## **A. CARRYING A CONCEALED DEADLY WEAPON**

See AZ Briefs – Revised, Deadly Weapons and Dangerous Instruments, for definition of "deadly weapon," "firearm," and constructive/joint possession of a firearm.

### **1. Furtherance of a Felony**

Under A.R.S. § 13-3102(A)(1)(a), a person commits misconduct involving weapons by knowingly carrying a deadly weapon except a pocket knife concealed on his person or within his immediate control in or on a means of transportation in furtherance of a serious offense as defined in § 13-706, a violent crime as defined in § 13-901.03 or any other felony offense. Under § 13-3102(M), weapons misconduct under subsection (A)(1)(a) is a class 6 felony.

### **2. Means of Transportation**

Under A.R.S. § 13-3102(A)(1)(b), a person commits misconduct involving weapons by knowingly carrying a deadly weapon except a pocket knife concealed on his person or within his immediate control in or on a means of transportation when contacted by a law enforcement officer and failing to accurately answer whether the person is carrying a concealed deadly weapon. Weapons misconduct under subsection (A)(1)(b) a class 1 misdemeanor. A.R.S. § 13-3102(M).

“Contacted by a law enforcement officer” means a lawful traffic or criminal investigation, arrest or detention or an investigatory stop by a law enforcement officer that is based on reasonable suspicion that an offense has been or is about to be committed. A.R.S. § 13-3102(N)(1). If a law enforcement officer contacts a person who is in possession of a firearm, the law enforcement officer may take temporary custody of the firearm for the duration of that contact. A.R.S. § 13-3102(L).

### **3. Under 21 Years**

Under A.R.S. 13-3102(A)(2), a person under 21 years commits misconduct involving weapons by knowingly carrying a deadly weapon except a pocket knife concealed on his person or concealed within his immediate control in or on a means of transportation. Under § 13-3102(M), weapons misconduct under subsection (A)(2) is a class 3 misdemeanor.

#### **i. Exclusions**

Pursuant to § 13-3102(B), subsection (A)(2) does not apply to: (1) a person's dwelling, business premises, or real property owned or leased by that person or his/her parent, grandparent or legal guardian; (2) a member of the sheriff's posse or reserve organization who has passed firearms training approved by the Arizona peace officer standards and training board and is authorized by the sheriff to carry a concealed weapon pursuant to § 11-441; or (3) a firearm that is carried in: (a) a manner where any portion of the firearm or holster in which the firearm is carried is visible; (b) a holster that is wholly or partially visible; (c) a scabbard or case designed for carrying weapons that is wholly or partially visible; (d) luggage; (e) a case, holster, scabbard, pack or luggage that is carried within a means of transportation or within a storage compartment, map pocket, trunk or glove compartment of a means of transportation.

A fanny pack is not included in the definition of "luggage." *State v. Moerman*, 182 Ariz. 255, 260 (App.1994). See also *State v. McDermott*, 208 Ariz. 332, 335-36, ¶¶ 6-10, 14 (App. 2004) (defendant who carried a handgun in his fanny pack was not exempt from prosecution for carrying a concealed weapon; further, the word "luggage" is not unconstitutionally vague).

Pursuant to § 13-3102(C), subsection (A)(2) does not apply to: (1) a peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties; (2) a member of the U.S. or any state military forces in the performance of official duties; (3) a warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the state department of corrections or the department of juvenile corrections; (4) a person specifically licensed, authorized or permitted pursuant to federal or Arizona statute.

Pursuant to A.R.S. § 13-3102(J), subsection (A)(2) does not apply to commercial nuclear generating station armed nuclear security guards during the performance of official duties or during any security training exercises sponsored by the commercial nuclear generating station or local, state or federal authorities.

#### **4. Concealment**

The purpose of A.R.S. § 13-3102(A) is to protect the public by preventing an individual from having on hand a deadly weapon of which the public is unaware, and which an individual may use in a sudden heat of passion. *State v. Adams*, 189 Ariz. 235, 237 (App. 1997), quoting *State v. Moerman*, 182 Ariz. 255, 261 (App.1994). A weapon is concealed if it is hidden from the “ordinary observation” or the “ordinary sight” of another person; generally, this means the weapon must be open to the ordinary observation of persons who may come in contact in the usual and ordinary associations of life with one who carries a weapon. In all instances, common sense must prevail. The critical question turns on whether an individual, standing near a person with a firearm may by ordinary observation know the questioned object to be a firearm. The ultimate decision must rest upon the trier of fact under the circumstances of each case. *State v. Adams*, 189 Ariz.

235, 238 (App. 1997) (weapon found between passenger seat and door of vehicle in which defendant was passenger was “concealed,” even if weapon was visible from certain angle outside vehicle; weapon was hidden from “ordinary observation” or “ordinary sight” of persons outside vehicle).

## **B. PROHIBITED WEAPONS**

Under A.R.S. § 13-3102(A)(3), a person commits misconduct involving weapons by knowingly manufacturing, possessing, transporting, selling or transferring a prohibited weapon, except that if the violation involves dry ice, a person commits misconduct involving weapons by knowingly possessing the dry ice with the intent to cause injury to or death of another person or to cause damage to the property of another person. Misconduct involving weapons under subsection (A)(3) is a class 4 felony. A.R.S. § 13-3102(M).

### **1. Definition**

A.R.S. § 13-3101(A)(8)(a) provides that "prohibited weapon" includes the following:

- (i) An item that is a bomb, grenade, rocket having a propellant charge of more than four ounces or mine and that is explosive, incendiary or poison gas.
  - (ii) A device that is designed, made or adapted to muffle the report of a firearm.
  - (iii) A firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger.
  - (iv) A rifle with a barrel length of less than sixteen inches, or shotgun with a barrel length of less than eighteen inches, or any firearm that is made from a rifle or shotgun and that, as modified, has an overall length of less than twenty-six inches.
- BUT under A.R.S. § 13-3101(B), the items set forth in subsection A(8) (a) (i), (ii), (iii) and (iv) do not include any firearms or devices that are registered in the national firearms registry and transfer records of the United States treasury department or

any firearm that has been classified as a curio or relic by the United States treasury department.

- See *State v. Kerr*, 142 Ariz. 426, 432-433 (App. 1984) (actual, not constructive, possession is required where automatic weapon is registered in National Firearms registry because legislature cannot have intended to make felons of all individuals living with the lawful possessor of an automatic weapon.)
- The State is not required to prove a weapon is not registered with the United States Treasury Department; by excepting certain registered firearms from the definition of prohibited weapons, the legislature did not intend to create non-registration as an element of the offense. The defendant is required to prove the existence of statutory exceptions to a weapons offense and the police are not obligated to acquire evidence to help him do so. *State v. Berryman*, 178 Ariz. 617, 621 (App.1994).

(v) An instrument, including a nunchaku, that consists of two or more sticks, clubs, bars or rods to be used as handles, connected by a rope, cord, wire or chain, in the design of a weapon used in connection with the practice of a system of self-defense.

- But pursuant to A.R.S. § 13-3102(H), subsection (A)(3) does not apply to a weapon described in § 13-3101(A)(8)(a)(v) if such weapon is possessed for the purposes of preparing for, conducting or participating in lawful exhibitions, demonstrations, contests or athletic events involving the use of such weapon.

(vi) A breakable container that contains a flammable liquid with a flash point of one hundred fifty degrees Fahrenheit or less and that has a wick or similar device capable of being ignited.

(vii) A chemical or combination of chemicals, compounds or materials, including dry ice, that is possessed or manufactured for the purpose of generating a gas to cause a mechanical failure, rupture or bursting or an explosion or detonation of the chemical or combination of chemicals, compounds or materials.

(viii) An improvised explosive device.

- Under A.R.S. § 13-3101(5), “improvised explosive device” means a device that incorporates explosives or destructive, lethal, noxious, pyrotechnic or incendiary chemicals and that is designed to destroy, disfigure, terrify or harass.

(ix) Any combination of parts or materials that is designed and intended for use in making or converting a device into an item set forth in item (i), (vi) or (viii) of this subdivision.

A.R.S. § 13-3101(A)(8)(b) provides that "prohibited weapon" does not include: (i) any fireworks that are imported, distributed or used in compliance with state laws or local ordinances; (ii) any propellant, propellant actuated devices or propellant actuated industrial tools that are manufactured, imported or distributed for their intended purposes; or (iii) a device that is commercially manufactured primarily for the purpose of illumination.

## **2. Exclusions**

Pursuant to § 13-3102(C), subsection (A)(3) does not apply to: (1) a peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties; (2) a member of the U.S. or any state military forces in the performance of official duties; (3) a warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the state department of corrections or the department of juvenile corrections; (4) a person specifically licensed, authorized or permitted pursuant to a U.S. or Arizona statute.

- Re § 13-3102(C)(4), see *State v. Kerr*, 142 Ariz. 426, 433-434 (App. 1984) (legislature intended to make it a crime to possess a prohibited weapon unless the possessor is also the person who registered the weapon in accordance with the National Firearms Registry; actual possession by anyone other than the registration holder is prohibited.)

Pursuant to A.R.S. § 13-3102(E), subsection (A)(3) does not apply to:

(1) The possessing, transporting, selling or transferring of weapons by a museum as a part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution, if:

(a) Such museum or institution is operated by the United States, Arizona, or a political subdivision, or by an organization described in 26 United States Code section 170(c) as a recipient of a charitable contribution; and

(b) Reasonable precautions are taken with respect to theft or misuse of such material.

- (2) The regular and lawful transporting as merchandise; or
- (3) Acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

Pursuant to A.R.S. § 13-3102(J), subsection (A)(3) does not apply to commercial nuclear generating station armed nuclear security guards during the performance of official duties or during any security training exercises sponsored by the commercial nuclear generating station or local, state or federal authorities.

### **3. Sawed-off Shotgun**

A weapon prohibited by A.R.S. § 13-3102(A)(3) includes a “shotgun with a barrel length of less than eighteen inches.” A.R.S. § 13-3101(A)(8)(a)(iv). Testimony from a sheriff's deputy about a weapon's measurements using various points of reference establishing that the barrel measured approximately 15 inches in length was sufficient to support conviction for possession of a prohibited weapon. Further, A.R.S. § 13-3102(A)(3) is not unconstitutionally vague because it does not define what constitutes the “barrel” of a gun; the definition of barrel the deputy sheriff used was consistent with the definition in Webster's New Collegiate Dictionary (1981 ed.), the “discharging tube of a gun.” *State v. Davila*, 189 Ariz. 44, 45 (App. 1997).

### **4. Mens Rea**

The statutory definition of firearm under A.R.S. § 13–3101(4) makes an exception for firearms in “permanently inoperable condition.” A disassembled or broken weapon



falls within the applicable definition of prohibited weapon if it can be made operable with reasonable preparation, including the addition of a readily replaceable part or the accomplishment of a quickly-effected repair. A weapon with a missing but replaceable firing pin is only temporarily, not permanently, inoperable. Similarly, a broken weapon that needs repair may constitute a firearm if it can be readily restored to operability. *State v. Young*, 192 Ariz. 303, 306-07, ¶¶ 11-12 (App. 1998). Operability of the weapon is not an element of the offense of knowingly possessing a prohibited weapon; rather, permanent inoperability is an affirmative defense to that and other firearm offenses. *State v. Young*, 192 Ariz. 303, 307, ¶ 16 (App. 1998), citing *State v. Rosthenhausler*, 147 Ariz. 486, 490-93 (App.1985).

If operability is not an element of the offense, neither can knowledge of operability be an element of the offense; thus, knowledge of operability is not part of the culpable mental state the State is obliged to prove. *State v. Young*, 192 Ariz. 303, 307, ¶ 16 (App. 1998). But knowledge of the prohibited characteristics of a weapon is a more nuanced issue. Under A.R.S. 13-204(A)(1), ignorance or mistaken belief as to a matter of fact relieves person of criminal liability if it negates culpable mental state required for commission of the offense. *State v. Young*, 192 Ariz. at 307-08, ¶ 17.

In analyzing the weapons misconduct statute, the absence of any express distinction between the elements under A.R.S. § 13–3102(A) suggests, pursuant to § 13-202(A)(if statute defining offense prescribes culpable mental state sufficient for commission of offense without distinguishing among the elements, the prescribed mental state applies to each element), that a "knowing" mental state must be proven as to both the act and the prohibited nature or characteristics of the weapon. The numerous

subsections of § 13-3102(A) list various forms of misconduct; each subsection contains two components: (1) identification of forbidden acts, such as carrying, possessing, selling, or supplying; and (2) identification of the type of weapon as to which such acts are forbidden. One subsection alone, § 13-3102(A)(7) regarding defaced deadly weapons, explicitly requires that the actor *know* the weapon is of the forbidden type. *State v. Young*, 192 Ariz. 303, 308, ¶¶ 18-19, (App. 1998).

The contrast between § 13-3102(A)(7) and the remainder of the statute suggests the legislature distinguished the actor's knowing commission of a forbidden act involving a weapon from the actor's knowledge of the forbidden characteristics of the weapon. In other words, it suggests legislative intent to relieve the State from proving the actor's knowledge that the weapon was of a forbidden type except where proof of such knowledge is explicitly required. *State v. Young*, 192 Ariz. 303, 309, ¶ 21 (App. 1998). Contrasting possession of a deadly defaced weapon under § 13-3102(A)(7) with possession of a sawed-off shotgun under (A)(3), for both crimes the legislature required proof of knowing possession of a weapon. But for the former crime, the legislature added the requirement that the State prove knowledge of the offending condition; for the latter crime, it did not. The logic of this distinction is that defacement of a weapon – the removal of its serial number – is not a conspicuous condition, whereas a sawed-off shotgun is conspicuously so. *Id.* at 311, ¶ 28. But neither is it a strict liability offense. In conclusion, to prove culpable mental state the State must prove the defendant knew he possessed a sawed-off shotgun but need not prove he knew the specific barrel or overall length that made it a statutorily prohibited weapon. *Id.* at 311-12, ¶¶ 31, 32.

## **C. PROHIBITED POSSESSORS**

See AZ Briefs-Revised, Deadly Weapons and Dangerous Instruments, for restoration of right to bear arms, and constructive / joint possession.

Under A.R.S. § 13-3102(A)(4), a person commits misconduct involving weapons by knowingly possessing a deadly weapon or prohibited weapon if such person is a prohibited possessor. Misconduct involving weapons under subsection (A)(4) is a class 4 felony. A.R.S. § 13-3102(M). Under A.R.S. § 13-3102(A)(5) a person commits misconduct involving weapons by knowingly selling or transferring a deadly weapon to a prohibited possessor; misconduct involving weapons under subsection (A)(5) is a class 6 felony. A.R.S. § 13-3102(M).

“Deadly weapon” means anything that is designed for lethal use. The term includes a firearm.” A.R.S. § 13–3101(A)(1). Defining “deadly weapon” to include a firearm does not exclude everything else “designed for lethal use” that is not a firearm from the definition. A “knife clearly qualifies as a deadly weapon under A.R.S. § 13-3101.” *State v. Clevidence*, 153 Ariz. 295, 300-01 (App. 1987) (double-edged hunting knife approximately six inches in length, found under defendant's shirt, was “deadly weapon” within meaning of statute prohibiting possession of deadly weapon by felon).

### **1. Definition**

Under A.R.S. § 13-3101(A)(7), a “prohibited possessor” means any person:

(a) Who has been found to constitute a danger to self or to others or to have persistent or acute disabilities or grave disabilities pursuant to court order pursuant to § 36-540, and whose right to possess a firearm has not been restored pursuant to § 13-925.

(b) Who has been convicted within or without this state of a felony or who has been adjudicated delinquent for a felony and whose civil right to possess or carry a gun or firearm has not been restored.

- Stipulation that defendant was a prohibited possessor was not the functional equivalent to a plea of guilty to offense of weapons misconduct and thus trial court was not required to advise defendant of consequences of stipulation and obtain his waiver before reading stipulation to jury; the state was required to prove both that defendant was a prohibited possessor and that he knowingly possessed a deadly weapon, defendant did not admit that he knowingly possessed a deadly weapon, and admission of underlying facts, specifically that he was a prohibited possessor because of his two previous felony convictions, might have prejudiced defendant. *State v. Allen*, 220 Ariz. 430, 433-434, ¶¶ 17, 18 (App. 2008), vacated in part by *State v. Allen*, 223 Ariz. 125 (2009).
- Defendant tried as prohibited possessor is not entitled to the State's compelled acceptance of a stipulation that he was prohibited possessor. Such a stipulation would remove from jury's consideration elements of the charged offense – that he had prior felony conviction and that his civil right to possess or carry firearm had not been restored. *State v. Lopez*, 209 Ariz. 58, 56-60, ¶¶ 4-8 (App. 2004).
- Notwithstanding *Lopez, supra*, the non-restoration of a defendant's civil rights is not an element of the offense. *State v. Kelly*, 210 Ariz. 460, 463, ¶ 11 (App. 2005). Rather, restoration is an exception under the prohibited possessor statutes that must be proven by the defendant. *Id.* at 462–63, ¶¶ 6, 10. At trial, the defendant bears the burden to offer admissible evidence that his civil rights have been restored, and if he fails to do so, the state will prevail on the issue without being required to present any evidence of non-restoration. *Id.* at 462-64, ¶¶ 6, 13.
- Evidence of defendant's full name and birth date on prior conviction was sufficient to establish identity for purposes of showing prior conviction for prohibited possessor charge in the absence of any evidence casting doubt on the identification. *State v. Kinney*, 225 Ariz. 550, 558, ¶ 24 (App. 2010); see also *State v. McCurdy*, 216 Ariz. 567, 573-574, ¶¶ 15-16 (App. 2007)(evidence established defendant was the person identified in California documents as convicted of felon in Arizona prosecution for prohibited possession of weapon; evidence linked person booked in Arizona county jail with person identified in California documents and showed defendant was that person, with supervisor of security services section of Arizona county jail testifying that “booker” at county jail verifies that person who is “sitting in the chair is the person you are supposed to photograph and fingerprint,” that he had viewed videotape of defendant's booking process, and that defendant was the person who was booked, and signatures for named subject of Arizona jail receipt and California documents were similar).

- Although a prohibited possessor may be justified by necessity under § 13-417 in threatening force by means of a firearm, that justification is narrowly circumscribed by the tandem requirements that (1) the threat of harm be imminent, and (2) that no reasonable alternative exists. *State v. Pina-Barajas*, No. 2 CA-CR 2017-0102 (March 30, 2018); see also *State v. Medina*, 2018 WL 1403818 (App. March 20, 2018).
- See also: A.R.S. 13-3113, Juvenile Prohibited Possessors, *infra*.

(c) Who is at the time of possession serving a term of imprisonment in any correctional or detention facility.

- Person who was on parole and living at the home of his aunt at the time he possessed handgun was not serving a term of imprisonment “in” any correctional or detention facility so as to be a prohibited possessor of the weapon for purposes of conviction for misconduct involving weapons. *State v. Johnson*, 171 Ariz. 39 (App. 1992). See now subsection (d), below.

(d) Who is at the time of possession serving a term of probation pursuant to a conviction for a domestic violence offense as defined in § 13-3601 or a felony offense, parole, community supervision, work furlough, home arrest or release on any other basis or who is serving a term of probation or parole pursuant to the interstate compact under title 31, chapter 3, article 4.1.

- The phrase “release on any other basis” requires that a person be “serving a term,” and thus does not apply to pre-conviction release. *State v. Barnett*, 209 Ariz. 352, 356, ¶ 18 (App. 2004) (defendant who had neither been sentenced to a term of confinement nor been placed on a probationary term at the time of the charged offenses could not have violated the prohibited possessor statute when he was arrested for possessing a deadly weapon).
- The legislature chose to make “the time of possession” the only relevant point at which the defendant must have been “serving a term of probation pursuant to a conviction for a domestic violence offense.” A prohibited possessor charge is essentially a status offense. Therefore, a charge of possession of a deadly weapon by a prohibited possessor is not subject to dismissal on the grounds that the underlying conviction giving rise to the prohibited possessor status is vacated on constitutional grounds where at the time of the defendant's arrest for that charge, he was still bound by his as yet unchallenged guilty plea to the underlying crime

and by the probation imposed as a result of the plea. *State v. Mangum*, 214 Ariz. 165, 169-170, ¶¶ 13, 16 (App. 2007).

(e) Who is an undocumented alien or a nonimmigrant alien traveling with or without documentation in this state for business or pleasure or who is studying in this state and who maintains a foreign residence abroad.

- However, this subdivision does not apply to: (i) nonimmigrant aliens who possess a valid hunting license or permit that is lawfully issued by a state in the United States; (ii) nonimmigrant aliens who enter the United States to participate in a competitive target shooting event or to display firearms at a sports or hunting trade show that is sponsored by a national, state or local firearms trade organization devoted to the competitive use or other sporting use of firearms; (iii) certain diplomats; (iv) officials of foreign governments or distinguished foreign visitors who are designated by the United States department of state; (v) persons who have received a waiver from the United States attorney general.

(f) Who has been found incompetent pursuant to Rule 11, Ariz. R. Crim. P., and who subsequently has not been found competent.

(g) Who is found guilty except insane.

## **2. Consecutive Sentences**

Consecutive sentences for attempted murder and misconduct involving weapons are precluded by A.R.S. § 13-116, the statutory bar against double punishment, where it is factually impossible for the defendant to shoot the victim without also committing misconduct involving weapons, and the prohibited possession of a firearm has not exposed the victim to a risk that exceeded that inherent to the attempt on his life. *State v. Carreon*, 210 Ariz. 54, 75, ¶¶ 108-109 (2005); see also *State v. Karr*, 221 Ariz. 319, 324, ¶ 19 (App. 2008) (sentence for misconduct involving weapons could not be ordered to be served consecutively to the sentence imposed for murder; alleged misconduct involving weapon was shooting of victim).

Defendant's convictions for theft of a firearm and for misconduct involving that same firearm did not arise out of single act, as required to render consecutive sentences improper under § 13-116; defendant, as prohibited possessor of firearm, could have illegally possessed firearm without stealing it, the evidence apart from evidence supporting misconduct conviction was sufficient to support the theft conviction, and the risk of harm presented by committing theft and weapons misconduct was different. *State v. Cotten*, 228 Ariz. 105, 108-109, ¶¶ 7-10(App. 2011).

Consecutive sentences were properly imposed on a defendant convicted of aggravated assault with a deadly weapon and possession of a deadly weapon as a prohibited possessor; the more serious crime of aggravated assault occurred when the defendant shot at the victim, prohibited possession occurred when the defendant shot at the victim's car after the victim ran into the house, and defendant's continued prohibited possession of a deadly weapon after the victim ran into the house exposed the victim to an additional risk beyond that inherent in being threatened at gunpoint. *State v. Urquidez*, 213 Ariz. 50, 52-53, ¶¶ 6-10 (App. 2006).

### **3. Mens Rea**

Under § 13-3102(A)(4), the State must prove the defendant possessed the weapon knowingly, and knew it was a deadly weapon. But it is not required to prove the defendant knew he was a prohibited possessor. See *State v. Harmon*, 25 Ariz.App. 137, 139 (1975) (fact of possession of gun constitutes the crime, “defendant charged with this crime need not have known he acted illegally”); see also *State v. Tyler*, 149 Ariz. 312, 316 (App.1986) (state need prove only knowing possession, not that defendant possessed weapon with criminal intent). Further, ignorance or a mistaken belief as to a matter of fact relieves a

person of criminal liability only when it negates the culpable mental state required for commission of the offense. A.R.S. § 13-204(A)(1). Ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility. A.R.S. § 13-204(B). A mistaken belief that one's gun rights had been restored involves an error of law. See *State v. Olvera*, 191 Ariz. 75, 77 (App.1997) (defendant's claim he was led to believe ability to possess firearm unaffected by statutory change was mistake of law; thus, no defense to crime charged); *Harmon*, 25 Ariz.App. at 139 (defendant's belief "full status as a citizen" had been restored mistake of law; not cognizable defense to crime involving weapons).

#### **4. Juvenile Prohibited Possessors**

Under A.R.S. § 13-3113, a person who was previously adjudicated delinquent for an offense that would be a felony if committed by an adult and who possesses, uses or carries a firearm within 10 years from the date of his adjudication or his release or escape from custody is guilty of a class 5 felony for a first offense. The person is guilty of a class 4 felony for a second or subsequent offense if the person was previously adjudicated for an offense that if committed as an adult would constitute: (1) burglary in the first degree; (2) burglary in the second degree; (3) arson; (4) any felony offense involving the use or threatening exhibition of a deadly weapon or dangerous instrument; (5) a serious offense as defined in § 13-706.

See also: A.R.S. 13-3101(7)(b), *supra*, a prohibited possessor means any person who has been convicted within or without this state of a felony or who has been adjudicated delinquent for a felony and whose civil right to possess or carry a gun or firearm has not been restored.



## **D. DEFACED WEAPONS**

Under A.R.S. § 13-3102(A)(6), a person commits misconduct involving weapons by knowingly defacing a deadly weapon. Under A.R.S. § 13-3102(A)(7), a person commits misconduct involving weapons by knowingly possessing a defaced deadly weapon knowing the deadly weapon was defaced. Both offenses are class 6 felonies. A.R.S. § 13-3102(M). “Deface” means to remove, alter or destroy the manufacturer's serial number. A.R.S. § 13-3101(2).

### **1. Exclusions**

Pursuant to § 13-3102(C), subsection (A)(7)(possession), does not apply to: (1) a peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties; (2) a member of the U.S. or any state military forces in the performance of official duties; (3) a warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the state department of corrections or the department of juvenile corrections; (4) a person specifically licensed, authorized or permitted pursuant to a U.S. or Arizona statute.

Pursuant to A.R.S. § 13-3102(E), subsection (A)(7)(possession) does not apply to:

1. The possessing, transporting, selling or transferring of weapons by a museum as a part of its collection or an educational institution for educational purposes or by an authorized employee of such museum or institution, if:

(a) Such museum or institution is operated by the United States or this state or a political subdivision of this state, or by an organization described in 26 United States Code section 170(c) as a recipient of a charitable contribution; and

(b) Reasonable precautions are taken with respect to theft or misuse of such material.

2. The regular and lawful transporting as merchandise; or
3. Acquisition by a person by operation of law such as by gift, devise or descent or in a fiduciary capacity as a recipient of the property or former property of an insolvent, incapacitated or deceased person.

Pursuant to A.R.S. § 13-3102(J), subsection (A)(7)(possession) does not apply to commercial nuclear generating station armed nuclear security guards during the performance of official duties or during any security training exercises sponsored by the commercial nuclear generating station or local, state or federal authorities.

#### **E. FELONY DRUG OFFENSE**

Under A.R.S. § 13-3102(A)(8), a person commits misconduct involving weapons by knowingly using or possessing a deadly weapon during the commission of any felony offense included in chapter 34 of Title 13. This offense is a class 4 felony. A.R.S. § 13-3102(M). The allowable unit of prosecution for weapons misconduct under A.R.S. § 13-3102(A)(8) is one charge for each deadly weapon used or possessed during the commission of a felony drug offense. *State v. Gutierrez*, 1 CA-CR 15-0342 (September 1, 2016).

##### **1. Nexus between Weapon and Drug Crime**

This statute requires more than a mere temporal nexus between the weapon and the crime alleged. The thrust of the statute is to deter the use of weapons to facilitate crime. The State must prove that the defendant intended to use or could have used the weapon to further the felony drug offense underlying the weapons misconduct charge. Factors tending to show that the weapon was or could be used in this way for a drug offense include the spatial proximity and accessibility of the weapon to the defendant and

to the site of the drug offense. One or more of these factors may suffice to establish a nexus, depending upon the crime alleged. *State v. Petrak*, 198 Ariz. 260, 266, ¶ 19 (App. 2000). See *State v. Butler*, 230 Ariz. 465, 469-470, ¶¶ 10, 11 (App. 2012)(sufficient evidence supported conclusion that defendant knew and constructively possessed pistol found on bed at residence as necessary to support conviction for possession of a deadly weapon during a felony drug offense; defendant entered into the garage at the residence, stayed there for nearly one hour, and then drove his car onto the street, after that, he reentered the house, where he had both a view of and access to the loaded firearm found on top of the bed, and marijuana was found inside the house, along with abundant evidence of marijuana trafficking).

## **2. Double Jeopardy / Consecutive Sentencing**

Under A.R.S. § 13-3102(A)(8), drug and weapons offenses may be separately punished without violating double jeopardy; further, consecutive sentences may be imposed for the drug and weapons offenses without violating A.R.S. § 13-116, the statutory prohibition against consecutive sentences for a single act. *State v. Siddle*, 202 Ariz. 512, 515-18, ¶¶ 7-19 (App. 2002).

## **F. FIRING AT OCCUPIED STRUCTURE**

Under A.R.S. § 13-3102(A)(9), a person commits misconduct involving weapons by knowingly discharging a firearm at an occupied structure in order to assist, promote or further the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise. This offense is a class 3 felony. A.R.S. § 13-3102(M).

## **1. Definitions**

“Occupied structure” means any building, object, vehicle, watercraft, aircraft or place with sides and a floor that is separately securable from any other structure attached to it, that is used for lodging, business, transportation, recreation or storage and in which one or more human beings either are or are likely to be present or so near as to be in equivalent danger at the time the discharge of a firearm occurs. Occupied structure includes any dwelling house, whether occupied, unoccupied or vacant. A.R.S. § 13-3101(6).

“Criminal street gang” means an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member. A.R.S. § 13-105(8). “Criminal street gang member” means an individual to whom at least two of the following seven criteria that indicate criminal street gang membership apply: (a) self-proclamation; (b) witness testimony or official statement; (c) written or electronic correspondence; (d) paraphernalia or photographs; (e) tattoos; (f) clothing or colors; (g) any other indicia of street gang membership. A.R.S. § 13-105(9).

Under A.R.S. § 13-105(17) “enterprise” includes any corporation, association, labor union or other legal entity; *but see* A.R.S. § 13-2301(D)(2) “enterprise” means any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity. “Criminal syndicate” means any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing basis in conduct that violates any one or more provisions of any felony statute

of this state. A.R.S. § 13-2301(C)(7). “Racketeering” means any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country in which the act occurred and, if the act occurred in a state or country other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state, and that would be punishable by imprisonment for more than one year under the laws of this state and, if the act occurred in a state or country other than this state, under the laws of the state or country in which the act occurred, regardless of whether the act is charged or indicted, and the act involves either (a) terrorism, animal terrorism or ecological terrorism that results or is intended to result in a risk of serious physical injury or death, or (b) any of 34 enumerated following acts if committed for financial gain. A.R.S. § 13-2301(D)(4).

#### **G. PUBLIC ESTABLISHMENT OR EVENT**

Under A.R.S. § 13-3102(A)(10) a person commits misconduct involving weapons by knowingly, unless specifically authorized by law, entering any public establishment or attending any public event and carrying a deadly weapon on his person after a reasonable request by the operator of the establishment or the sponsor of the event or the sponsor's agent to remove his weapon and place it in the custody of the operator of the establishment or the sponsor of the event for temporary and secure storage of the weapon pursuant to § 13-3102.01. This offense is a class 1 misdemeanor. A.R.S. § 13-3102(M).

##### **1. Definitions**

“Public establishment” means a structure, vehicle or craft that is owned, leased or operated by this state or a political subdivision of this state. A.R.S. § 13-3102(N)(2). “Public event” means a specifically named or sponsored event of limited duration that is

either conducted by a public entity or conducted by a private entity with a permit or license granted by a public entity. Public event does not include an unsponsored gathering of people in a public place. A.R.S. § 13-3102(N)(3).

A personal request to remove weapon by the operator of the establishment or sponsor of the event is not required; therefore, a properly worded sign asking clients or other persons to check their weapons at the entrance would serve as a “reasonable request by the operator,” so that the failure to relinquish a weapon at the door would constitute a criminal offense. Op.Atty.Gen. No. I88-119, 1988 WL 249701. Because a government office is a public establishment, the state is permitted to request those entering the public building to relinquish any weapons on their person, and the building manager qualifies as an “operator of the establishment” or “sponsor of the event” for purposes of subsec. A, par. [10] of this section, by which the Legislature intended that persons entering public establishments or attending public events must relinquish their deadly weapons upon reasonable request to do so. Op.Atty.Gen. No. I88-119, 1988 WL 249701.

## **2. Exclusions**

Pursuant to § 13-3102(C), subsection (A)(10) does not apply to: (1) a peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties; (2) a member of the U.S. or any state military forces in the performance of official duties; (3) a warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the state department of corrections or the department of juvenile corrections; (4) a person specifically licensed, authorized or permitted pursuant to a U.S. or Arizona statute.

Pursuant to A.R.S. § 13-3102(D), subsection A(10) does not apply to an elected or appointed judicial officer in the court facility where the judicial officer works if the judicial officer has demonstrated competence with a firearm as prescribed in § 13-3112, subsection N, except that the judicial officer shall comply with any rule or policy adopted by the presiding judge of the superior court while in the court facility. For the purposes of this subsection, appointed judicial officer does not include a hearing officer or a judicial officer pro tempore that is not a full-time officer.

Under A.R.S. § 13-3102(G), subsection A(10) shall not apply to shooting ranges or shooting events, hunting areas or similar locations or activities. Under A.R.S. § 13-3102(K), the operator of the establishment or the sponsor of the event or the employee of the operator or sponsor or the agent of the sponsor, including a public entity or public employee, is not liable for acts or omissions pursuant to subsection (A)(10) unless the operator, sponsor, employee or agent intended to cause injury or was grossly negligent.

## **H. POLLING PLACE**

Under A.R.S. § 13-3102(A)(11) a person commits misconduct involving weapons by knowingly, unless specifically authorized by law, entering an election polling place on the day of any election carrying a deadly weapon. This offense is a class 1 misdemeanor. A.R.S. § 13-3102(M).

### **1. Exclusions**

Pursuant to § 13-3102(C), subsection (A)(11) does not apply to: (1) a peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties; (2) a member of the U.S. or any state military forces in the performance of official duties; (3) a warden, deputy warden, community correctional

officer, detention officer, special investigator or correctional officer of the state department of corrections or the department of juvenile corrections; (4) a person specifically licensed, authorized or permitted pursuant to a U.S. or Arizona statute.

## **I. SCHOOL GROUNDS**

Under A.R.S. § 13-3102(A)(12) a person commits misconduct involving weapons by knowingly possessing a deadly weapon on school grounds. This offense is a class 1 misdemeanor. However, if the violation occurs in connection with conduct that violates: § 13-2308(A)(5)(hiring, engaging or using a minor for participating or assisting a criminal syndicate); § 13-2312(C)(hires, engages or uses a minor for illegal control or conducting of an enterprise); § 13-3409(involving or using minors in drug offenses); or § 13-3411(drugs in a school zone), then the offense is a class 6 felony. A.R.S. § 13-3102(M).

“School” means a public or nonpublic kindergarten program, common school or high school. A.R.S. § 13-3102(N)(4). “School grounds” means in, or on the grounds of, a school. A.R.S. § 13-3102(N)(5).

### **1. Exclusions**

Pursuant to § 13-3102(C), this subsection does not apply to: (1) a peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties; (2) a member of the U.S. or any state military forces in the performance of official duties; (3) a warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the state department of corrections or the department of juvenile corrections; (4) a person specifically licensed, authorized or permitted pursuant to a U.S. or Arizona statute.



Pursuant to A.R.S. § 13-3102(H), this subsection does not apply to a weapon if such weapon is possessed for the purposes of preparing for, conducting or participating in hunter or firearm safety courses.

Pursuant to A.R.S. § 13-3102(I), subsection (A)(12) shall not apply to the possession of a:

1. Firearm that is not loaded and that is carried within a means of transportation under the control of an adult provided that if the adult leaves the means of transportation the firearm shall not be visible from the outside of the means of transportation and the means of transportation shall be locked.
2. Firearm for use on the school grounds in a program approved by a school.
3. Firearm by a person who possesses a certificate of firearms proficiency pursuant to § 13-3112, subsection T and who is authorized to carry a concealed firearm pursuant to the law enforcement officers safety act of 2004 (P.L. 108-277; 118 Stat. 865; 18 United States Code sections 926B and 926C).

## **J. POWER PLANTS**

Under A.R.S. § 13-3102(A)(12) a person commits misconduct involving weapons by knowingly, unless specifically authorized by law, entering a nuclear or hydroelectric generating station carrying a deadly weapon on his person or within the immediate control of any person. This offense is a class 4 felony. A.R.S. § 13-3102(M).

### **1. Exclusions**

Pursuant to § 13-3102(C), subsection (A)(13) does not apply to: (1) a peace officer or anyone summoned by a peace officer to assist and while actually assisting in the performance of official duties; (2) a member of the U.S. or any state military forces in the performance of official duties; (3) a warden, deputy warden, community correctional officer, detention officer, special investigator or correctional officer of the state department

of corrections or the department of juvenile corrections; (4) a person specifically licensed, authorized or permitted pursuant to a U.S. or Arizona statute.

Pursuant to A.R.S. § 13-3102(J), subsection (A)(13) does not apply to commercial nuclear generating station armed nuclear security guards during the performance of official duties or during any security training exercises sponsored by the commercial nuclear generating station or local, state or federal authorities.

#### **K. PROVIDING FIREARM FOR COMMISSION OF FELONY**

Under A.R.S. § 13-3102(A)(14), a person commits misconduct involving weapons by knowingly supplying, selling or giving possession or control of a firearm to another person if the person knows or has reason to know that the other person would use the firearm in the commission of any felony. This offense is a class 3 felony. A.R.S. § 13-3102(M).

#### **L. TERRORISM**

Under A.R.S. § 13-3102(A)(15) a person commits misconduct involving weapons by knowingly using, possessing or exercising control over a deadly weapon in furtherance of any act of terrorism as defined in § 13-2301 or possessing or exercising control over a deadly weapon knowing or having reason to know that it will be used to facilitate any act of terrorism as defined in § 13-2301. This offense is a Class 2 felony. A.R.S. § 13-3102(M).

A.R.S. § 13-2301(2) provides that "terrorism" means any felony, including any completed or preparatory offense, that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to either: (a) influence the policy or affect the conduct of this state or any of the

political subdivisions, agencies or instrumentalities of this state; (b) cause substantial damage to or substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments or other public services.

## **M.     TRAFFICKING WEAPONS /EXPLOSIVES**

Under A.R.S. § 13-3102(A)(16) a person commits misconduct involving weapons by knowingly trafficking in weapons or explosives for financial gain in order to assist, promote or further the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise. This offense is a class 3 felony. A.R.S. § 13-3102(M).

### **1.     Definitions**

“Trafficking” means to sell, transfer, distribute, dispense or otherwise dispose of a weapon or explosive to another person, or to buy, receive, possess or obtain control of a weapon or explosive, with the intent to sell, transfer, distribute, dispense or otherwise dispose of the weapon or explosive to another person. A.R.S. § 13-3101(9).

“Criminal street gang” means an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member. A.R.S. § 13-105(8). “Criminal street gang member” means an individual to whom at least two of the following seven criteria that indicate criminal street gang membership apply: (a) self-proclamation; (b) witness testimony or official statement; (c) written or electronic correspondence; (d) paraphernalia or photographs; (e) tattoos; (f) clothing or colors; (g) any other indicia of street gang membership. A.R.S. § 13-105(9)

Under A.R.S. § 13-105(17) “enterprise” includes any corporation, association, labor union or other legal entity; but see A.R.S. § 13-2301(D)(2) “enterprise” means any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity. “Criminal syndicate” means any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing basis in conduct that violates any one or more provisions of any felony statute of this state. A.R.S. § 13-2301(C)(7). “Racketeering” means any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country in which the act occurred and, if the act occurred in a state or country other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state, and that would be punishable by imprisonment for more than one year under the laws of this state and, if the act occurred in a state or country other than this state, under the laws of the state or country in which the act occurred, regardless of whether the act is charged or indicted, and the act involves either (a) terrorism, animal terrorism or ecological terrorism that results or is intended to result in a risk of serious physical injury or death, or (b) any of 34 enumerated following acts if committed for financial gain. A.R.S. § 13-2301(D)(4).